STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 9, 2003
v	No. 237822 Midland Circuit Court
DAVID ALLEN PERRY, Defendant-Appellant.	LC No. 01-009814-FH

Before: Donofrio, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant was convicted by a jury of fraudulent retention or use of building contract funds, MCL 570.152, conducting an enterprise through a pattern of racketeering activity, MCL 750.159i(1), acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity, MCL 750.159i(2), and embezzlement by an agent of $20,000 or more, MCL 750.174(5)(a). He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 9 to 15 years for the fraudulent-use-of-proceeds conviction and 12 to 25 years each for the racketeering and embezzlement convictions. He appeals as of right. We affirm.

Defendant's conviction arose from his involvement with a construction company, Advantage Builders. Defendant was convicted of embezzling money from Advantage Builders and also of improperly using money provided by several of Advantage Builders' customers that should have been used to pay for the costs of labor and supplies related to construction projects. Defendant always promised performance but personally used much of the money he received.

I

Defendant first argues that there was insufficient evidence to support his racketeering convictions because there was no evidence that Advantage Builders was guilty of racketeering. We disagree.

The premise of defendant's argument runs contrary to the plain language of the pertinent statute. An enterprise need not be guilty of racketeering in order for a defendant to be convicted of a racketeering-related crime under MCL 750.159i(1) or (2). MCL 750.159i(1) prohibits a person from "knowingly conduct[ing] or participat[ing] in the affairs of the enterprise directly or indirectly through a pattern of racketeering activity." Nothing in this language requires the enterprise itself to be guilty of racketeering.

Likewise, MCL 750.159i(2) prohibits a person from "knowingly acquir[ing] or maintain[ing] an interest in or control of an enterprise or real or personal property used or intended for use in the operation of an enterprise, directly or indirectly, through a pattern of racketeering activity." Again, nothing in this language requires the enterprise to be guilty of racketeering. Thus, we reject defendant's argument as being contrary to the clear and unambiguous language of the statute. *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003).[1]

II

Defendant next argues, in effect, that his conviction of two racketeering counts for violating two different subsections of MCL 750.159i violates his constitutional protections against double jeopardy.[2] We disagree. Even if both of these convictions may be characterized as being predicated on the same facts, we nonetheless conclude that there is no double jeopardy violation. In the multiple punishment context, "the Double Jeopardy Clause acts as a restraint on the prosecutor and the Courts, not the Legislature." *People v Mitchell*, 456 Mich 693, 695; 575 NW2d 283 (1998). Accordingly, as our Supreme Court has stated,

> [w]here the issue is one of multiple punishment rather than successive trials, the double jeopardy analysis is whether there is a clear indication of legislative intent to impose multiple punishment for the same offense. If so, there is no double jeopardy violation. [*Id.* at 695-696.]

MCL 750.159i states,

> (1) A person employed by, or associated with, an enterprise shall not knowingly conduct or participate in the affairs of the enterprise directly or indirectly through a pattern of racketeering activity.
>
> (2) A person shall not knowingly acquire or maintain an interest in or control of an enterprise or real or personal property used or intended for use in the operation of an enterprise, directly or indirectly, through a pattern of racketeering activity.

---

[1] Defendant suggests that we should look to federal case law interpreting an analogous federal statute, 18 USC 1962(a), for guidance. We recognize that if a Michigan statutory provision closely mirrors a federal provision, "interpretations of the federal statute provide highly persuasive, although not binding, authority." *Dana v American Youth Foundation*, 257 Mich App 208, 215; 668 NW2d 174 (2003). Notwithstanding how federal courts may interpret counterpart federal statutes, however, our primary obligation in interpreting Michigan law is to ascertain and effectuate the intent of the Legislature by focusing on the statute itself. *Chambers v Trettco, Inc*, 463 Mich 297, 313-314; 614 NW2d 910 (2000). Because we find the Michigan statute to be clear and unambiguous, resort to federal cases interpreting the analogous federal statute is unnecessary.

[2] Although defendant's statement of the question regarding this issue is framed as a sufficiency of the evidence claim, it substantively consists of a double jeopardy claim and we treat it as such.

> (3) A person who has knowingly received any proceeds derived directly or indirectly from a pattern of racketeering activity shall not directly or indirectly use or invest any part of those proceeds, or any proceeds derived from the use or investment of any of those proceeds, in the establishment or operation of an enterprise, or the acquisition of any title to, or a right, interest, or equity in, real or personal property used or intended for use in the operation of an enterprise.
>
> (4) A person shall not conspire or attempt to violate subsection (1), (2), or (3).

The separate categorization and numbering of the prohibited conduct listed under MCL 750.159i and the different social norms protected by each subsection indicates that the Legislature intended a violation of each subsection to constitute a separate offense warranting separate punishment. *People v Lugo*, 214 Mich App 699, 706; 542 NW2d 921 (1995). Subsection four also illustrates this intent by separately prohibiting a defendant from conspiring or attempting "to violate subsection (1), (2), or (3)." While MCL 750.159j(1) generally categorizes a violation of MCL 750.159i as "a felony," this language does not indicate that the Legislature intended conviction of only one count to follow from a defendant's violation of two different subsections that prohibit different conduct. Rather, the Legislature's use of the words "violate" in MCL 750.159i(4) and "violates" in MCL 750.159j(1) indicates the opposite – that the Legislature intended each violation of a subsection in MCL 750.159i to constitute a separate violation of MCL 750.159i.

Significantly, MCL 750.159j(11) also states, "Criminal penalties under this section are not mutually exclusive and do not preclude the application of any other criminal or civil remedy under this section or any other provision of law." So MCL 750.159j(11) suggests that defendant's conviction of one count for violating MCL 750.159i(1) does not preclude conviction of an additional count based on his violation of MCL 750.159i(2). Because the Legislature clearly intended to allow separate punishments under the circumstances of this case, defendant's conviction of two counts for separate violations of different subsections of MCL 750.159i does not violate double jeopardy.

III

Next, defendant argues that there was insufficient evidence to support his conviction of fraudulent retention or use of building contract funds in violation of MCL 570.152, because he was not a "contractor" subject to this statutory provision, but rather merely an employee of the contractor. We disagree. Defendant's position that a mere employee of a contractor cannot be guilty of violating MCL 570.152 is contrary to this Court's decision in *People v Brown*, 239 Mich App 735; 610 NW2d 234 (2000). In *Brown*, the defendant was a corporate officer of a construction company who withdrew funds that were paid by a person for the construction of a home and instead put the funds to her personal use while leaving subcontractors unpaid. *Id.* at 737-738. This Court rejected the defendant's argument that only the company as the "contractor" could be held criminally liable under MCL 570.152. *Brown, supra* at 739. Rather, corporate employees are personally liable for all criminal acts in which they participate. *Id.* In rejecting the defendant's argument that there was insufficient evidence to support her conviction because she was not the "contractor" for the project, this Court stated that she could be held responsible "as long as she personally caused the corporation to violate the statute . . .." *Id.* at

743. Thus, we reject defendant's position that he cannot be held criminally liable under MCL 570.152 because he was not a "contractor."

Defendant also asserts that he did not have the ability or responsibility to pay laborers, subcontractors, or suppliers from the funds of Advantage Builders, but this is immaterial. Testimony from a Citizens Bank employee indicated that defendant obtained disbursements of $32,000 and $14,700 from the account of Douglas Hill, which was to be used in connection with the relevant construction project. According to Mark Krenzke's testimony, defendant used that money to obtain cashier's checks that were used to pay off liens on unrelated projects. Hill testified that liens were filed against his property by various subcontractors and that other subcontractors contacted him about not being paid and that he made payments to some of these subcontractors from his own money. Thus, there was evidence that defendant was personally involved in the misuse of contractor funds by using them for purposes unrelated to the Hill project, even though the relevant subcontractors had not first been paid. Accordingly, defendant could be held personally liable for causing Advantage Builders to violate MCL 570.152 in this regard, irrespective of whether he had the formal legal responsibility of making payments on behalf of the company.

Defendant also argues that there was no evidence that he had an intent to defraud Hill. But MCL 570.153 provides that a contractor's peremptory appropriation of money earmarked for expenses "shall be evidence of intent to defraud." Further, even apart from MCL 570.153, minimal circumstantial evidence is sufficient to prove an actor's state of mind. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). In this case, the evidence that defendant used funds paid by Hill for purposes unrelated to the relevant construction project without first paying the pertinent subcontractors was sufficient to allow the jury to determine that defendant had an intent to defraud Hill.

IV

Defendant argues that there was insufficient evidence to support his conviction of embezzlement by an agent of $20,000 or more, MCL 750.174(5)(a). We disagree. Viewed in a light most favorable to the prosecution, the evidence was sufficient to support the conviction.

A conviction for embezzlement by an agent requires proof that (1) the money in question belonged to the principal, (2) the defendant had a relationship of trust as an agent or employee of the principal, (3) the money came into the defendant's possession because of the trust relationship, (4) the defendant dishonestly converted or secreted the money for his own use (5) without the principal's consent, and (6) the defendant intended to cheat or defraud the principal at the time of the conversion. *People v Lueth*, 253 Mich App 670, 683; 660 NWd 322 (2002). Also, to establish the specific charge of embezzlement by an agent of $20,000 or more, the prosecution necessarily had to prove that the amount of money involved was $20,000 or more. MCL 750.174(5)(a).

There was sufficient evidence to enable the jury to find each of these elements beyond a reasonable doubt. A finding that the money at issue belonged to Advantage Builders is supported by Sally Brown's testimony that she gave defendant a check for $50,000 because he needed it to pay subcontractors with regard to her construction project. The testimony of John and Mark Krenzke reflected that defendant held a relationship of trust with Advantage Builders

as its agent or employee. Brown's testimony indicated that she gave the money to defendant because of his relationship of trust with Advantage Builders. Considering together the testimony that, from Brown's $50,000 check, defendant was given a cashier's check for $27,685 payable to Frances Hetzner, that he further retained $2,315 in cash, that he only had a cashier's check for $20,000 made payable to Advantage Builders, that Advantage Builders reflected a deposit of only $20,000 at the pertinent time, and that defendant never told Mark Krenzke about obtaining the cashier's check for Hetzner or retaining the approximate $2,300 in cash, there was sufficient evidence to support a finding that defendant dishonestly disposed of $30,000. Also, Mark Krenzke's lack of knowledge of the $30,000, and John Krenzke's testimony that he was not involved with the Brown project, support a finding that defendant retained that money without the consent of Advantage Builders. This evidence of defendant secretly retaining $30,000 also supports a finding that he intended to cheat or defraud Advantage Builders of that amount. Thus, there was sufficient evidence to support defendant's embezzlement conviction.

We note that defendant makes a statement in his brief indicating that the cashier's check for $27,685 to Hetzner was used to repay a deposit for a cancelled job, implying that giving the money to her in this manner was not an embezzlement of funds for his own purposes, but rather a payment to Hetzner of an amount that she was owed by the company from company funds. However, this assertion is not supported by the record, inasmuch as no evidence was presented that Hetzner made such a payment to Advantage Builders. Indeed, in and near the portion of the record cited by defendant, Mark Krenzke actually testified that he did not know about defendant receiving $27,685 in cash from Hetzner at all. Thus, even if we were to accept that defendant used the $27,685 to "refund" a deposit paid to him by Hetzner (despite the lack of evidence to that effect), the evidence would still support defendant's embezzlement conviction because Mark Krenzke's testimony would support the conclusion that defendant personally retained that amount initially paid to him by Hetzner and then defrauded Advantage Builders of the same amount of money to "repay" her.

V

Defendant next complains that the prosecutor improperly presented other-acts evidence and engaged in other inappropriate conduct. We conclude that defendant is not entitled to relief based on these unpreserved claims of error.

First, contrary to defendant's inaccurate assertion that he objected to the admission of the evidence of his prior felony convictions, the record discloses that defense counsel actually stipulated to the admission of evidence of those convictions. This constituted a waiver of this matter, thereby extinguishing any error. *People v Carter,* 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Next, although defendant's statement of the question also complains about the prosecutor admitting evidence of his parole status, he presents no argument regarding this point. By failing to argue the matter, defendant has abandoned any claim of error in this regard. *People v Anderson,* 209 Mich App 527, 538; 531 NW2d 780 (1995).

Defendant argues that it was improper for the prosecutor to offer testimony regarding his extensive gambling at a casino. However, we conclude that there was no plain error warranting relief based on this unpreserved matter. *People v Carines,* 460 Mich 750, 763-764; 597 NW2d

130 (1999). First, with regard to the embezzlement charge, the evidence was relevant to show that money retained by defendant was used for personal gambling purposes, as opposed to being used to pay debts and obligations of Advantage Builders. Further, evidence indicating that defendant gambled extensively was admissible as evidence of his motive to improperly retain funds that he acquired in connection with his role in the company. See *Brown, supra* at 749 (evidence of personal financial difficulty relevant to the defendant's motive to defraud).

Defendant's argument that the prosecution improperly charged him with two racketeering counts must fail in light of our conclusion that there was no double jeopardy violation in connection with his convictions of these counts.

Finally, defendant argues that the prosecution selectively prosecuted him because it did not prosecute John or Mark Krenzke, who were the owners of Advantage Builders. Assuming that defendant correctly represents that neither John or Mark Krenzke were ever prosecuted in connection with the underlying events, defendant has not established any plain error warranting relief with regard to this unpreserved matter. The prosecution has "exclusive authority to decide whom to prosecute." *People v Williams,* 244 Mich App 249, 251; 625 NW2d 132 (2001). The law limits a trial court's authority over prosecutorial duties to acts or decisions that are unconstitutional, illegal, or ultra vires. *People v Jones,* 252 Mich App 1, 6-7; 650 NW2d 717 (2002). There is nothing in the record to plainly indicate that it was unconstitutional, illegal, or ultra vires for the prosecutor to decide to pursue charges against defendant, but not against John or Mark Krenzke. As set forth previously, there was substantial evidence that defendant intentionally embezzled money. In contrast, there is little or no indication in the record before us that John or Mark Krenzke intentionally defrauded anyone. Certainly, it is reasonable, and not unconstitutional, illegal, or ultra vires, for a prosecutor to seek a conviction for the most egregious offenses and refrain from pursuing convictions where the facts do not suggest wrongdoing. Therefore, the prosecutor did not violate defendant's rights by not prosecuting other, less culpable individuals.

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Peter D. O'Connell